

12/19/2012 8:49 AM

No. 39984-9

**IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

IN RE PERSONAL RESTRAINT PETITION OF:

FRANK C. EARL,

PETITIONER.

**SUPPLEMENTAL BRIEF IN SUPPORT OF
PERSONAL RESTRAINT PETITION**

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A. INTRODUCTION

This supplemental brief, requested by the Court, addresses the application of three recent Washington Supreme Court decisions: *In re PRP of Morris*, __ Wn.2d __, __ P.3d __, 2012 WL 5870496 (2012); *State v. Wise*, __ Wn.2d __, __ P.3d __, 2012 WL 5870496 (2012), and *State v. Paumier*, __ Wn.2d __, __ P.3d __, 2012 WL 5870479 (2012). Those cases, along with previous binding precedent, mandate reversal of this case.

A portion of Earl's jury selection was conducted in a private setting in violation of the right to an open and public trial. Defense counsel did not seek the closure. He failed to object. The fact that defense counsel sought to question an additional juror privately after the court closed the courtroom does not waive the earlier error, at least as to the other jurors who were questioned privately. In addition, the trial court completely failed to conduct the required *Bone-Club* hearing. A reviewing court presumes harm from a structural error. Reversal is required.

B. SUMMARY OF RELEVANT FACTS

Mr. Earl summarizes the facts, limited to the oral conduct of voir dire in a private setting. This supplemental brief does not address the separate claimed public trial violation from the use of "confidential" questionnaires.

Eight jurors were brought into the judge's chambers and questioned privately, primarily about issues where the jurors had requested privacy. Excerpt of Proceedings 12/5/05 RP 26-57. No hearing preceded the private questioning of jurors. Instead, the judge simply remarked: “Now, we’re going to adjourn to chambers and inquire of some members of the venire.” RP 26. Before adjourning to chambers the Court addressed those individuals in open court and stated “stay where you are, if you would, please.....We will adjourn to chambers now.” RP 26. Present in chambers, were the Court, counsel, Mr. Earl, and the court reporter. RP 27.

In chambers, the court and parties questioned either jurors, primarily on topics where the jurors had requested privacy. Of the eight questioned in chambers, four were excused for cause—three because they could not be fair to the defendant and one because she was friends with the State's witnesses. RP 34, 37,40, 57. Defense counsel requested to question the eighth juror, who had indicated association with a number of the State's witnesses. *Id.* at RP 50, 56.

In addition, the court and counsel briefly discussed the findings from the CrR 3.5 motion, as well as the conduct of the remainder of voir dire. RP 55-56.

Argument

This case is squarely controlled by Washington Supreme Court precedent.

The Trial Court Announced the Court Would Be Closed

A trial court is required to *resist* closure. *State v. Bone–Club*, 128 Wash.2d 254, 259, 906 P.2d 325 (1995). In this case, the judge *sua sponte* announced the closure of the courtroom.

A trial court is also required to consider alternatives to closure even when they are not offered by the parties. *Paumier*, slip opinion at ¶ 8. See also *Presley v. Georgia*, 558 U.S. 209, 130 S.Ct. 721, 725, 175 L.Ed.2d 675 (2010). In this case, the trial court never considered any alternative to closure.

If a court intends to close the courtroom it must consider all of the *Bone–Club* factors before closing a trial proceeding. *Paumier, supra* (“Failure to conduct the *Bone–Club* analysis is structural error warranting a new trial because voir dire is an inseparable part of trial.”). The trial court did not consider any of the required factors. Instead, the court simply announced that it would grant closure.

Earl Did Not Waive His Right to an Open and Public Trial

In *Paumier*, *Wise* and *Morris*, the Washington Supreme Court reaffirmed that a defendant does not waive his right to a public trial by

failing to object to a closure at trial. *Wise, supra* at ¶ 22 (“Wise did not object when the trial court moved part of the voir dire proceedings into chambers.”); *Paumier, supra* at ¶ 3 (“The prosecution, defense counsel, and Paumier were all present for the questioning and offered no objections.”); *Morris, supra* at ¶ 17 (finding that Morris waived his right to be present, but only after and perhaps because trial court declared intention to close courtroom). See also *State v. Marsh*, 126 Wash. 142, 145–47, 217 P. 705 (1923).

The State may nevertheless argue that Earl’s case is like the prior decision in *State v. Momah*, 167 Wash.2d 140, 152, 217 P.3d 321 (2009), because Earl’s counsel questioned jurors in chambers and because he asked to question an additional juror. *Wise* made it clear, however, that *Momah* presented a unique set of facts:

Momah was distinguishable from other public trial violation cases on two principal bases: (1) more than failing to object, the defense affirmatively assented to the closure of voir dire and actively participated in designing the trial closure and (2) though it was not explicit, the trial court in *Momah* effectively considered the *Bone–Club* factors. At bottom, *Momah* presented a unique confluence of facts: although the court erred in failing to comply with *Bone–Club*, the record made clear—without the need for a post hoc rationalization—that the defendant and public were aware of the rights at stake and that the court weighed those rights, with input from the defense, when considering the closure.

Wise, at ¶ 20.

This case is nothing like the “unique confluence” of facts in *Momah*. Earl’s trial counsel did not assist in designing the closure. Instead, he

simply asked to add one additional juror to the process of individual questioning—which the trial court had already decided would take place in a private setting.

Just as importantly, the trial court did not conduct any portion of the required *Bone-Club* hearing. *Momah* found that the trial judge had essentially conducted a complete hearing. The recent trio of Washington Supreme Court decisions has made it clear that the judge’s failure to accurately apply all of the *Bone-Club* factors is a structural error that requires reversal.

Further, the *Wise* Court made it clear that the facts in *Momah* were unique: “We emphasize that it is unlikely that we will ever again see a case like *Momah* where there is effective, but not express, compliance with *Bone-Club*. The rule remains that deprivation of the public trial right is structural error. Since *Wise* did not waive his right to a public trial by not objecting, and prejudice is presumed, a new trial is warranted.” *Id.*

This Court should reach the same result. This case is much more like *Wise*, *Paumier*, and *Morris*. The failure to conduct a “virtual” *Bone-Club* hearing makes it dissimilar to *Momah*.

Reversal is Required

The State will almost certainly argue that the evaluation of prejudice from a courtroom closure in a PRP remains unresolved. It is certainly true that *Morris* was decided on narrow grounds and the Supreme Court did

“not address whether a public trial violation is also presumed prejudicial on collateral review because we resolve Morris's claim on ineffective assistance of appellate counsel grounds instead.” However, both *Paumier* and *Wise* explained how to evaluate the harm that flows from a structural error.

In a PRP, a petitioner must show “actual and substantial” prejudice. *In re Pers. Restraint of Woods*, 154 Wash.2d 400, 409, 114 P.3d 607 (2005). In a direct appeal involving an “unpreserved error,” the defendant must show a manifest or “actual” error affecting a constitutional right. In the case of a structural error, the necessary prejudice is always presumed.

In *Paumier*, the court held that a prejudice is always presumed with a structural error:

The next concerns we must address are whether Paumier had to contemporaneously object to the individual questioning to preserve the error and if he must show prejudice on appeal. Ordinarily, a party must contemporaneously object to preserve an error. RAP 2.5. However, RAP 2.5(a) allows an unobjected to error to be raised on appeal if it is a “manifest error affecting a constitutional right.” This court has previously interpreted “manifest error” as requiring a defendant to show actual prejudice. *State v. O'Hara*, 167 Wash.2d 91, 99, 217 P.3d 756 (2009). Here, that would mean Paumier must show actual prejudice because he failed to object to the closure during trial. But RAP 2.5(a) does not apply in its typical manner here because the improper courtroom closure was structural error. As noted in *Wise*, “[n]othing in our rules or our precedent precludes different treatment of structural error as a special category of ‘manifest error affecting a constitutional right.’ ” *Wise*, — Wash.2d at — n. 11, — P.3d — (quoting RAP 2.5(a)(3)).

In fact, there is good reason to treat structural errors, like violation of a defendant's public trial right, differently. A structural error

“affect[s] the framework within which the trial proceeds” and renders a criminal trial an improper “ ‘vehicle for determin[ing] guilt or innocence.’ ” *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (quoting *Rose v. Clark*, 478 U.S. 570, 578, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986)). The right to a public trial is a unique right that is important to both the defendant and the public. *Wise*, — Wash.2d at —, — P.3d —; *Momah*, 167 Wash.2d at 148, 217 P.3d 321. Moreover, assessing the effects of a violation of the public trial right is often difficult. *Wise*, — Wash.2d at —, — P.3d — (quoting *United States v. Marcus*, — U.S. —, 130 S.Ct. 2159, 2165, 176 L.Ed.2d 1012 (2010)). Requiring a showing of prejudice would effectively create a wrong without a remedy. Therefore, we do not require a defendant to prove prejudice when his right to a public trial has been violated.

Paumier, at ¶ 12-13. *Wise* added:

Structural error is a special category of constitutional error that “affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself.” *Fulminante*, 499 U.S. at 310, 111 S.Ct. 1246. Where there is structural error “ ‘a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.’ ” *Id.* (quoting *Rose v. Clark*, 478 U.S. 570, 577–78, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986) (citation omitted)). Structural error, including deprivation of the public trial right, is not subject to harmlessness analysis. *Id.* at 309–10; *Easterling*, 157 Wash.2d at 181, 137 P.3d 825. A defendant “should not be required to prove specific prejudice in order to obtain relief.” *Waller*, 467 U.S. at 49, 104 S.Ct. 2210. Accordingly, unless the trial court considers the *Bone–Club* factors on the record before closing a trial to the public, the wrongful deprivation of the public trial right is a structural error presumed to be prejudicial. *Easterling*, 157 Wash.2d at 181, 137 P.3d 825; *Orange*, 152 Wash.2d at 814, 100 P.3d 291; *Bone–Club*, 128 Wash.2d at 261–62, 906 P.2d 325.

Wise, at ¶ 19.

The *Wise* Court added:

Because it is impossible to show whether the structural error of deprivation of the public trial right is prejudicial, we will not require *Wise* to show prejudice in his case. “We will not ask defendants to

do what the Supreme Court has said is impossible.” *Owens v. United States*, 483 F.3d 48, 65 (1st Cir.2007).

Id. at ¶ 29.

This is consistent with the holdings of the United States Supreme Court. In addition to the right to a public trial, the list of structural errors includes: the right to counsel; to counsel of choice; the right of self-representation; the right to an impartial judge; and the right to accurate reasonable-doubt jury instructions. *Gideon v. Wainwright*, 372 U.S. 335, 343-45 (1963) (reversing a felony conviction of a defendant who lacked counsel without analyzing the prejudice that the deprivation caused); *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) (deeming deprivation of counsel of choice a structural error); *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984) (finding harmless error analysis inapplicable to deprivation of the right to self-representation because exercising the right increases the chance of a guilty verdict); *Tumey v. Ohio*, 273 U.S. 510, 534 (1927) (holding that trial before a biased judge “necessarily involves a lack of due process”); *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993) (finding that, because of an inadequate reasonable-doubt instruction, no actual jury verdict had been rendered and the court could thus not apply harmless error analysis to determine whether the error affected the verdict). Aside from *Gonzalez-Lopez* and *Tumey*, all of the above cited cases were collateral attacks.

Structural errors “are so intrinsically harmful as to require automatic reversal (*i.e.*, ‘affect substantial rights’) without regard to their effect on the outcome.” See *Neder v. United States*, 527 U.S. 1, 7 (1999). As the *Neder* Court expressed: “Those cases, we have explained, contain a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself. Such errors infect the entire trial process, and ‘necessarily render a trial fundamentally unfair. Put another way, these errors deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence...and no criminal punishment may be regarded as fundamentally fair.’ ” *Neder*, 527 U.S. at 8-9. Because structural errors, such as a failure to hold a public trial, “defy harmless-error review” and “infect the entire trial process,” (*Neder*, 527 U.S. at 8), reviewing courts must “eschew[] the harmless-error test entirely.” *Arizona v. Fulminante*, 499 U.S. at 312.

Unlike trial rights, structural rights are “‘basic protection[s]’ whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function.” *Sullivan v. Louisiana*, 508 U.S. at 281. Structural errors have “consequences that are necessarily unquantifiable and indeterminate.” *Id.*; *United States v. González-Huerta*, 403 F.3d 727, 734 (10th Cir.2005) (“[I]f, as a categorical matter, a court is capable of finding that the error caused prejudice upon reviewing the record, then that class of errors is not structural.”).

If it is impossible to determine whether a structural error is prejudicial, *Sullivan*, 508 U.S. at 281, it necessarily follows that any defendant who claims structural error never needs to make out a case of identifiable prejudice. *See Sustache-Rivera v. United States*, 221 F.3d 8, 17 (1st Cir.2000) (“If [an error] did constitute structural error, there would be *per se* prejudice, and harmless error analysis, in whatever form, would not apply.”); *McGurk v. Stenberg*, 163 F.3d 470, 475 (8th Cir.1998) (holding that where counsel's deficient performance resulted in structural error, prejudice will be presumed). Otherwise, a post-conviction court requiring specific proof of prejudice would be asking post conviction petitioners to do what the courts have said is impossible.

Even in collateral review cases, structural errors are always considered “prejudicial” and accordingly are reversible *per se*. *See Hertz, Randy and Liebman, James, Federal Habeas Corpus Practice and Procedure*, 5th Ed. (2001), p. 1519.

The presumption of prejudice does not disappear in a PRP. Likewise, there is no justification to require the “impossible” in a PRP, but not in a direct appeal. Therefore, reversal is required whether the error is raised as an “unpreserved” manifest error on direct appeal or in a PRP.

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C. CONCLUSION

Based on the above, this Court should reverse and remand for a new trial.

DATED this 19th day of December, 2012.

Respectfully Submitted:

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12/19/2012 8:49 AM

CERTIFICATE OF SERVICE

I, Jeffrey Ellis, certify that I served a copy of this supplemental brief on opposing counsel by sending a copy via email to the Pierce County Prosecutor's Appellate Division at:

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December 19, 2012//Portland, OR
Date and Place

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